

REMARKS

Claims 1-3, 5, 7, 9-14, 16-18, 21-26 are pending. Claims 19, 20, 28, 29, 31-32 have been withdrawn. Claims 4, 6, 8, 15, 27 and 30 has been canceled.

Support for the amendment to claim 1 is found at page 3, line 10 of the as-filed application.

Claims 1-3, 5, 7, 9-14, 16-18 and 21-23 stand rejected under 35 USC 103 as being unpatentable over US Published Patent Application 2002/0049449 ("Bhatnagar") in view of US Patent No. 4,645,488 ("Matukas").

The Examiner finds that Bhatnagar discloses all the elements of the invention, except for the delivery tube 42 being flexible. The Examiner then finds that Matukas teaches a flexible syringe 10 with a flexible piston or plunger to reduce the frictional resistance between the material and the wall of the syringe or delivery tube, and that it would have been obvious to have provided a flexible syringe with a flexible plunger, as taught by Matukas, in the Bhatnagar system in order to reduce the frictional resistance between the material and the wall of the syringe.

Applicants respectfully traverse on two grounds. First, the Bhatnagar cannula identified by the Examiner as element 44 is not adapted to be received in a vertebral body. Second, neither reference discloses a flexible plunger.

Cannula

The "cannula" identified by the Examiner as element 44 is not adapted to be seated in a vertebral body. Rather, it is flexible and adapted to be received in a rigid device (12?) adapted to be received a bone.

Flexible Plunger

Applicants submit that Bhatnagar does not disclose a flexible plunger. Matukas does not cure this deficiency.

Applicants have repeatedly stated that Matukas does not disclose a flexible plunger. Matukas teaches a nylon plunger. In previous Office Actions, Applicants argued that the mere fact that the plunger rod can be made of nylon does not mean that the plunger rod must be flexible. Nylon components can be fabricated in ways that them very rigid. For example, US Patent Number 6,796,617 discloses a perdurable composite roller skating cylinder and methodology of making the same from low cost readily available commoditized commercial parts. In the in-line roller skating embodiment the cylinder will provide the combine features of long wear life, shock absorption and smooth running through the use of a rigid nylon core or equivalent and an appropriate longitudinal section of flexible polyurethane tubing or equivalent. Similarly, US Patent Number 4,76,816 discloses rigid nylon articles provided with a chamber therewithin and water is sealed within the chamber. Therefore, Matukas does not disclose a flexible plunger rod.

A proper use of Matukas would merely be that of making flexible the syringe 42 and the piston (distal portion) of the plunger of Bhatnagar. However, this does not cure the prime deficiencies of Bhatnagar, namely, its lack of a plunger having a flexible proximal portion.

In the Nov. 29, 2007 Office Action, the Examiner's response regarding Matukas was as follows:

Matukas teaches a plunger 14 made of nylon or a "flexible material". It is the Examiner's position that when a plunger or rod is made of nylon, it is capable of being bent or flexed. (Source: The American Heritage^R Dictionary of the English Language: Fourth Edition, 2000) For example, Hayakawa et al. (see col. 7, lines 51-62) discloses a push rod or plunger 31 made of a flexible material such as nylon.

Applicants respectfully traverse. Nowhere does Matukas say the plunger is made of a "flexible material". Applicants respectfully request the Examiner to point to the column and lines wherein Matukas states that the plunger is made of a "flexible material".

RECEIVED
CENTRAL FAX CENTER

MAY 19 2009

Applicants respectfully submit that the Examiner's position that "when a plunger or rod is made of nylon, it is capable of being bent or flexed", is contradicted by the evidence. Applicants have provided instances in US Patents in which nylon is cited as a rigid material. Merely because other patents recite nylon as being flexible does not mean that nylon materials are inherently flexible. Rather, the patent literature demonstrates that sometimes it is and sometimes it is not. Because the flexibility of nylon is variable, Matukas' failure to state that its nylon plunger is flexible means that Matukas did not teach that the nylon plunger is flexible. Rather, the skilled artisan would generally understand that a plunger is generally considered to be rigid, as syringe walls are generally considered to be rigid.

Therefore, the Examiner's proposed combination of Bhatnagar and Matukas fail to arrive at the present invention due to the lack of a flexible plunger.

Therefore, the present rejection should be withdrawn.

Also enclosed is a petition to revive and an RCE for consideration.

Respectfully submitted,

/Thomas M. DiMauro/

Thomas M. DiMauro
Attorney for Applicants
Reg. No. 35,490
Johnson & Johnson
1 Johnson & Johnson Plaza
New Brunswick, NJ 08933
(508) 880-8401